In the Supreme Court of the United States.

OCTOBER TERM, 1895.

HENRY W. BLAGGE ET AL., *Administrators Plaintiffs in Error*,
v.
FRANCIS V. BALCH, *Administrator*.
} No. 177.

IN ERROR TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR FRANCIS V. BALCH, ADMINISTRATOR, DEFENDANT IN ERROR.

This case involves the construction of the Acts of Congress relating to what are known as "French Spoliation Claims," and the matter is of wide importance, involving interests in many States of the Union.

Crowell Hatch, the original sufferer in this case, died testate, leaving four children, of whom three have living issue. The fourth, Henry, died childless, devising his property to his wife. The defendant in error is administrator *c. t. a.* of Henry's estate. Plaintiffs in error are administrators *d. b. n. c. t. a.* of Crowell Hatch, who devised his property equally to his four children.

The Congress of the United States by its Act of Jan.

20, 1885 (23 Statutes at large, page 283), submitted to the Court of Claims the determination of the claims "arising out of illegal captures, detentions, seizures, condemnations and confiscations prior to the ratification of the convention between the United States and the French Republic, concluded on the thirtieth day of September, 1800."

The Court of Claims under that Act was to "examine and determine the VALIDITY and AMOUNT of all the claims included in the description above mentioned, *together with the ownership*, etc.

The Court of Claims did accordingly examine and determine the *validity*, *amount*, and *ownership* of the claims made on account of seizures and confiscations entailing loss to Crowell Hatch (whom they represented as administrators *de bonis non*, *cum testamento annexo*) and reported to Congress that the plaintiffs in error, as claimants, were entitled to the following sums from the United States, thus: brig "Mary," "Henry W. Blagge, administrator, and Susan B. Samuels, administratrix, of Crowell Hatch, $1,050."*

The Report further says,

"The claimants in their representative capacity were the owners of said claims, which have never been assigned except as aforesaid."

Miscel. Doc. No. 5, p. 98, p. 119, p. 126, 50 Cong. 1st. Sess.

* The same administrators hold other claims of Crowell Hatch to a large amount, the distribution of which depends on this case.

Thereupon Congress, in 1891, passed an act making appropriations to pay these claims (26 U. S. Stats. at large, 862, at page 900). Approved, March 3, 1891.

No doubts or difficulty would have arisen, had it not been for the proviso imposed as a rider to this appropriation bill (26 Stats. at large, page 908) which read as follows: —

"*Provided*, that in all cases where the original sufferers were adjudicated bankrupts, the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the cases of individual claimants shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made represents the next of kin, and the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards."

The question which now arises, and the only question in this case is this: Does this rider make the funds appropriated divisible *only among living next of kin, to the exclusion of devisees, legatees and others.*

It is perfectly clear that, but for the proviso, no doubts whatever would have existed as to the distribution of the fund by administrators *qua administrators* and *as assets* in the ordinary course. The matter before the Court is the interpretation to be put upon this proviso.

In the work of interpretation, we first ascertain what is to be considered as indicating intent. The intent is to be gathered from the words of Congress, but the Acts of 1885 referring the cases to the Court of Claims, and the Act of 1891 dealing with the report of that Court, must of course be considered together, and other official utterances of the same body may be regarded as they may throw light on the matter. The nature of the subject is also to be considered, and the evils against which Congress was endeavoring to guard.

The first thing to be emphasized is this, that the claims Congress was dealing with were *valid claims of the original sufferers.*

(I.)

How the claims arose. Although matter of general and familiar history, it may not be improper to revert to certain characterizing features of the international difficulties which gave rise to the "French Spoliation Claims."

France had guaranteed to the American people "their liberty, sovereignty and independence, absolute and unlimited, with their possessions and additions or conquests made from Great Britain during the war."

Treaty of 1778.

The United States, on the other hand, guaranteed to France "all the possessions of France in America, as

well as those it might acquire by any future treaty of peace, and exclusive port privileges."

No elaboration is necessary. How France fulfilled her treaty obligations and how far the fate of this country depended upon her aid and support, no American can forget.

Then the French Revolution broke out. France called on this country to perform its obligations. To excuse her disregard of that request is no part of this brief; the fact remains that the United States did not perform her obligation; the treaty was not observed.

France stood alone, with Europe opposed. Starvation was the plan of Europe. To avoid starvation was the necessity of France. In these straits, every semblance of international law was brushed one side, all notion of private rights was brushed another, and France, in self-preservation, seized, condemned and confiscated the merchant vessels of this country in large numbers.

Since the day of the first seizure, it has been almost universally admitted, on the part of both the French and Americans, that by every principle of natural justice and international law, the individual sufferers from these losses had valid claims against the French government. Nothing could have been more frank than the acknowledgment of those claims by France and the French people. But there remained unsettled the second question between the two people as nations, viz., the failure of this government to observe the

treaty of 1778. That the United States was bound to indemnify France could not be controverted.

The claims of our citizens were vigorously pressed by Jefferson, then Secretary of State, and France was firm as to its claim against us, as a nation. The final settlement was a set-off, pure and simple.

Ratification Convention, September, 1800.

Had the actual international settlement been literally (what in effect it was), that the United States, as a nation, paid France, as a nation, say $10,000,000 as indemnity for our national disregard of the treaty of 1778, and thereafter the claims of our citizens against France had been liquidated at the same amount, and the money repaid, there can be no doubt that the money would have rested in the United States Treasury as the property of the citizens of the United States who had suffered the losses, and charged with a trust as clear as any statute law could make it.

Williams v. *Heard*, 140 U. S. 529, 540, 541.

The supposed case is, we submit, the real case so far as the rights of claimants are concerned.

No form of disbursement of that fund by Congress can cover up that trust. The delay of ninety years in distributing such a fund, and mere clumsiness of expression, cannot affect the rights of the original sufferers.

No lapse of time, no statutes of limitation, and no subtlety of argument will blind our courts to the facts

in this case. When a nation pays a national debt with the ships and cargoes of its private citizens, and subsequently provides for the payment of the claims of such citizens, it does not provide "gratuities."

For more than ninety years have these citizens had valid claims upon the government for this idemnity, — valid from every standpoint of natural right and law, as valid as is the claim of any United States bondholder to-day. A claim upon a promissory note does not cease to be valid when the statute bars the recovery, and that there is no judicial process for the enforcement or collection of the claim cannot change the character of the claim.

Suppose the United States should repudiate its bonds to-day, and ninety years hence should undertake to pay the descendants of their creditors a part of the original debt, would any court listen with patience to a characterization of that payment as a gratuity?

It is noteworthy that in no less than fourteen reports to the House and fifteen reports to the Senate have these claims been recognized as valid claims, and that in no report since 1826 have they been unfavorably reported. (See report No. 2320, p. 5, Senate, 51 Cong., 2d Sess.)

For the full history of these claims before Congress see report of Mr. Hoar from Committee on Claims. (Report No. 306, Senate, 48 Cong., 1st Sess.)

Congress well knew (as all intelligent people knew before this case arose to warp their judgments) that it was settling valid claims.

In the report of the Committee on Claims, made to Congress in February, 1891 (Senate Report No. 2320, 51st. Cong., 2d Session, the following language is used (pp. 38, 39) :

> When Congress opened its court to the claimants, and thus invited them to avail themselves of the opportunity of establishing their claims in pursuance of the mode provided by the statute, it was a moral assurance that Congress would pay those established before the court unless something in the decision showed that they should not be paid.

And it has long been the law that where private rights are sacrificed by the government *pro bono publico*, "the government is bound to make compensation and indemnify the individuals."

Ware v. *Hylton*, 3 Dallas, 245.
U. S. v. *Schooner Peggy*, 1 Cranch, 110.

The claims were assets from the date of the original losses to the date of payment.

If further argument be necessary, it is submitted that nothing could more conclusively show that Congress regarded the claims which it was paying as valid obligations than the fact that it should have thought necessary to provide in the Act that the awards should *not* go to the old assignees in bankruptcy of the original

claimant. They could not have done so upon any theory of gratuity

Emphasis has been thus put on this branch of the subject because a true understanding of the nature of the claims will assist in the correct interpretation of the Acts of Congress.

The case of *Gardner* v. *Clark*, 20 Wash. Law Reporter, p. 2, is an illustration of how mistaken ideas on this part of the case may lead to a wrong decision.

Mr. Justice Cox attempts to distinguish between these spoliation claims and the Alabama claims, so called, the claims growing out of the Treaty with Spain of 1819, and others, which gave rise to the cases of *Key* v. *Frelinghuysen*, 110 U. S. 71, *Williams* v. *Heard*, 140 U. S. 529, and *Comegys et al.* v. *Vasse*, 1 Peters, 193, and suggests that France and the United States agreed to "mutually renounce" their opposing claims, thus putting it as if each party had admitted the invalidity of its own claim and retracted it, instead of the fact that each party admitted the validity of the other's claim, recognized it, and paid it. If A owes B $100 rent, and B owes A $100 on a *quantum meruit* for services, and they meet and agree that the claims shall offset each other, is it renunciation or payment?

But the claims against France were claims of United States citizens. Has a nation no responsibility to its citizens if it renounces their just claims? The nation owed protection to its citizens against spoliation in time of peace and should be responsible, as was a "hundred" at common law for the results of rioting.

Cox, J., says further: "This government made a claim for reparation of these wrongs as an international wrong."

Gardner v. *Clarke*, ubi sup.

Davis, J., in *Gray* v. *United States* (21 Ct. Clms. 340), says of these claims that they were "individual in their inception but made national" only "by their presentation through the diplomatic department of the government."

Cox, J., alludes to the "quasi-warfare" existing between the countries, but that there was *not* a condition of war has been long and well established.

If there was war, when did it end? War generally ends in a treaty of peace. But the Treaty of 1800 was essentially a treaty of amity and commerce, with no word of war in it.

Again Cox, J., says the governments "mutually renounced" their claims, and "*thereupon*" the claimants "took the ground that the action of our Government amounted virtually to an appropriation of their property to public use, and demanded compensation."

But years before this, Jefferson, then Secretary of State, had said in his circular of Aug. 27, 1793: "I have it in charge from the President to assure the merchants of the United States, concerned in foreign commerce or navigation, that our attention will be paid to any injuries they may suffer on the high seas or in foreign countries contrary to the laws of nations and existing treaties, and that on their forwarding hither

well and authenticated evidence of the same, proper proceedings will be adopted for their relief." (See Wharton International Law, p. 606.)

Was it after the treaty of 1800 that the claimants took their stand? Have they ever changed their ground?

When our ministers offered France "8,000,000 francs, to be paid within seven years," did they not recognize these claims? When France offered a plan for commissioners "to liquidate the respective losses," did they not recognize the claims?

Mr. Madison, when Secretary of State, wrote that it was "a bargain," and in a letter to Mr. Pinckney, Minister to Spain, wrote, "The claims from which France was released were admitted by France, and the release was for a valuable consideration," etc. (Doc. 102, p. 795, Feb. 6, 1804.) Mr. Pickering, Secretary of State under the first two presidents, wrote that we bartered "the just claims of our merchants" to obtain a relinquishment of the French demand.

Napoleon, at St. Helena, testified that the "the just claims which America might have made for injuries done in time of peace were annulled," etc., and that he had considered the two opposing claims as "equi-ponderating each other."

Gourgaud Memoirs, Vol. II., p. 129.

Davis, J., in *Gray* v. *United States*, ubi sup., discusses this subject exhaustively, and says:

> But in the negotiation of 1800 we used "*individual*" claims against "*national*" claims, and the set-off was of French national claims against American individual claims. That any government has the right to do this, as it has the right to refuse war in protection of a wronged citizen, or to take other action, which, at the expense of the individual, is most beneficial to the whole people, is too clear for discussion. Nevertheless, the citizen whose property is thus sacrificed for the safety and welfare of his country, has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere is given him. A right often exists where there is no remedy, and a most frequent illustration of this is found in the relation of the subject to his sovereign, the citizen to his government.

Later, the ground, after elaborate reargument, was again gone over, and the Court reaffirmed and reinforced its former decision.

> *Cushing's Admr's* v. *United States*, 22 Ct. Clms. 1.

See, also,

> *Holbrook* v. *United States*, 21 Ct. Clms, pp. 438–441.

Such was the nature of the claims of private citizens of the United States, which Congress made the subject of its Act of 1885; and it is to be observed that the direction to the Court of Claims in that Act was to sift out, *not* the *meritorious*, but the *valid* claims, and to report, *not*

the names of the *needy* members of the families of original sufferers, but the *ownership of the claims*. Was Congress appointing a commission to determine some worthy objects of its national munificence, or was it sending its creditors into court to prove claims?

II.

We now pass to a consideration of the construction of the

Act of 1891.

The Court of Claims reported to Congress. That report was "advisory" only, and did not bind Congress or the claimants (Act of 1885). That the proviso against the conclusiveness of the awards of the Court of Claims was precautionary merely can hardly be seriously doubted. Congress merely said: Not knowing anything of the number of claimants, or the amount of the claims, or present ownership, or what judicial findings the Court may make, we will guard against the recording of final judgments against the government for indefinite millions, and will reserve the right to review the findings and awards. That is all.

The findings and awards being satisfactory, Congress passed the Appropriation Bill of 1891, adding the proviso which causes this case.

In seeking for the key-note of this proviso, the most obvious consideration is that Congress was dealing with

the settlement of claims nearly one hundred years old, and that numbers of the original sufferers had become bankrupts (many driven into bankruptcy by these very spoliations), and no single survivor of the original sufferers remained.

Congress had had the "Alabama Claims" distribution as an object lesson, where the disputes with assignees in bankruptcy, and the practical difficulties of proper distribution among creditors in insolvency after the lapse of years, stood prominent as danger signals. If creditors in bankruptcy of "Alabama" claimants were difficult to ascertain and reach, how would it be with the bankruptcy files of 1800, and where would the labor and the litigation end?

THE PROVISO ONLY APPLIES TO CASES WHERE THE ORIGINAL SUFFERER WAS BANKRUPT. NO PART OF IT IS INTENDED TO OPERATE IN ANY OTHER CASE. ALL OTHER CASES STAND ON THE WORD "PAY" AND THE DESIGNATION OF THE PAYEES IN THE SCHEDULE.

Assume for the moment that the proviso applies to the present and not to future appropriations.

The proviso is one sentence broken only by commas. It begins, "provided that in all cases where the original sufferers were adjudicated bankrupts." Here is a distinct and technical description of a particular catastrophe well known to every one — lawyer or layman. Beginning in this way, with special emphasis placed upon this particular event, the whole proviso would be expected

to relate to and be applicable to this event unless some other is distinctly introduced. If a new class of events were to be dealt with in the rest of the sentence it should naturally be clearly demarked, as if, for instance, it said, "and in cases where the original sufferer was not adjudged bankrupt," such and such shall be the rule. The sentence, however, goes on, "and the awards in the cases of individual claimants shall not be paid until," etc. There is no sensible construction which can be given to "indiuidval claimants" which will make it distinct and marked off from cases where the original sufferer was adjudicated bankrupt.

Would not assignees of bankrupts be individual claimants? Would not the next of kin on whose behalf the award is to be made in cases of bankruptcy be individual claimants?

We submit that the words "and in the cases of individual claimants" mean simply this, in the case of "*the* individual claimants," or in the case "of *each* individual claimant" who was so adjudicated, *i. e.*, that in each case where there was bankruptcy of the original sufferer or claimant, there shall be an investigation, to make sure that the party prosecuting the claim is acting for the next of kin, and not for the creditors. This is further shown by the word "*respectively*." This makes the whole consistent and clear, and is made further apparent by the differences in the operative words in the two parts of the sentence. In the leading part of

the sentence the words are, the "awards shall be *made*," but in the second part of the sentence the language is "and . . . the awards shall not be *paid*." This is natural if the latter part of the sentence provides merely an additional precaution affecting the cases spoken of in the earlier part; but it would be nothing short of extraordinary if the sentence should provide for the few cases of bankruptcy by mandatory words, "The awards shall be made," and should then proceed to dispose of the immeasurably larger and more important class of non-bankrupts, not by saying in such cases, too, the awards "shall be adem on behalf of next of kin," but by a merely negative administrative provision as to their payment when made. The reason for such a precaution in case of bankruptcy becomes apparent when it is remembered that the administrator or executor of the assignee might claim to receive the award on behalf of the next of kin, not being expressly excluded as the assignee himself is (*Richards* v. *Maryland Insurance Co.*, 8 Cranch. 84). Such administrator or executor might well be hostile to the next of kin, and even if the award were to the executor or administrator of the bankrupt sufferer he might be under the dominance of the creditors.

Another consideration leads irresistibly to the same conclusion. Had it been the intention in all cases to make the "payment" as a gratuity to the next of kin, it would have been the simplest thing possible to have said so. How strange, if such was the intent, to be-

gin by laying special stress upon the peculiar case of original sufferers who were adjudicated bankrupts. Such a case would be the exception, not the general rule. As well might the law say that every man who carries a concealed *revolver* shall be subject to a fine of five dollars, and every man who carries a concealed *weapon* shall be subject to a fine of five dollars.

Legal propositions do not ordinarily have the certainty of mathematical conclusions, but it seems almost a mathematical certainty that the latter part of this proviso could not have been intended to cover all cases of claimants. If not, what class was it intended not to cover?

It will be said it was intended to cover all but the "corporate" claimants, and that as a corporation could not have been adjudicated bankrupt, this construction leaves the bankrupt original sufferers to make one class, the solvent individual sufferers another class, and the corporate sufferers a third class, the provisions of the latter part of the proviso embracing all the bankrupts and all the individual non-bankrupts, it being in the case of bankrupts an additional precaution, and in the case of the non-bankrupts the sole precaution.

This is a possible construction, but it gives no explanation of the emphasis laid on the case of bankruptcy, or of the resulting inanity of providing clearly for the few, and ambiguously and imperfectly for the many, or of the improbability of any effort to produce in this cumbrous and dubious way an effect which only needed a word or two. Surely, to make an execu-

tor of a will take on behalf of next of kin (and there were many cases of executors among the claims appropriated for, our own being a case of administration with will annexed) it needs as strong language as to make an administrator of a bankrupt or of his assignee take on behalf of next of kin.

The marginal note to the proviso, though of no great weight, shows that the proviso was understood merely to cover cases of bankruptcy.

If it is considered forced to read "individual claimants" as "*the* individual claimants," thus making the proviso to require a certificate in each individual case of a bankrupt sufferer, which we submit is the most natural and must have been the real meaning, we may read it as applying to all cases where the administrators or executors, who are to take the bankrupt claim on behalf of next of kin are "individuals," it not being considered necessary to require a certificate in the case of corporate administrators or executors, as corporations would only be admitted to such trusts where clearly responsible. There are three such cases, at least, among those for which appropriations are made: The Safe Deposit and Trust Company, Baltimore, the Penn Company, and the Union Trust Company, New York. Or "individual claimants" may be intended to designate the "next of kin" who are substituted for creditors by the first part of the sentence, and in a certain loose sense may be considered as "individual" claimants as contradistinguished from an assignee claiming not for himself but others. In this sense again "indi-

vidual claimants" would cover the cases of bankruptcy and no more.

BUT THE PROVISO IS NOT APPLICABLE AT ALL TO THE PRESENT APPROPRIATIONS.

This appears from its use of the word "awards," from the evident belief on the part of the framers of the law that they had weeded out all cases of bankruptcy from the present appropriations, and by the use of the future tense.

This was so held in a well considered case in the Court of Claims,

Henry v. *U. S.* 27 Ct. of Claims, 1412.

IF FOR THE SAKE OF ARGUMENT THE CASE AT BAR BE CONCEDED TO BE ONE INTENDED TO BE COVERED BY THE WORDS "INDIVIDUAL CLAIMANTS," STILL THE QUESTION RECURS, WHAT DOES THE PROVISO PROVIDE IN SUCH CASE?

It provides a partial protection against creditors but does not attempt to protect against them absolutely. It does not attempt to fix the class who are to take absolutely.

The shield is applied to a broader class, it extends to cases where the original sufferer was not bankrupt; but the shield is not itself changed.

That protection is intended against creditors gener-

ally may, for the argument, be granted, but how thorough protection?

Where the original sufferer was bankrupt, and his assignee claimed, the award we have seen was to be changed so as to go to the executor or administrator.

Here no change is attempted in the award, but certain partial and preliminary precautions are to be taken before paying the award.

It is to appear, in substance, that debts are out of the way, that the heirs or legatees moved in getting the administration, and that the administrator is under suitable bonds.

If the proviso does operate as though it said the awards are to be on behalf of next of kin in all cases except those of corporate original sufferers, it uses "next of kin" in a loose sense, to cover all claimants under a solvent original sufferer.

The statute is wholly colorless as to any intent to set off next of kin against legatees. Can it be supposed for a moment that an executor could not be a claimant? Where there was a will there could be no administrator except with will annexed. The case at bar is such. Does the statute say that in all such cases the award shall be changed and made to an agent of the kin? Certainly not. What the statute does, upon the present assumption, is to set off kin as representing both heirs and legatees against creditors, the most conspicuous class, "next of kin," being put forward for the whole.

If it be said that the words "next of kin" cannot be so broadened, how narrow shall they be made? As

narrow as in *Swazey* v. *Jaques*, 144 Mass. 135, cutting off nephews if there was a brother? Surely not. And does not the impossibility of this show that the words were used in a loose and general sense, not the technical one? Why infringe farther than necessary upon doctrine of ownership by original sufferers?

But suppose for a moment this statute uses "next of kin" as opposed both to legatees and creditors, all it requires is that there should be next of kin and that the administrator should represent them.

The statute in that case does indeed say that the administrator must represent next of kin, but it does not say he must represent *living* next of kin, nor if it could be so construed does it say he must represent such exclusively. It may well be that Congress intended that if there were no living kin there should be no payment of a claim likely to prove escheated.

In the case at bar, the administrators could truly say they represented living next of kin, but they could not truly say they represented living next of kin exclusively. They represented those claiming under Henry Hatch, as well. How and when did they cease to represent us? They could truly say they represented next of kin exclusively, if, as is here contended, those living at the death of Crowell Hatch were the next of kin intended by the statute. It was a fraud on the Court of Claims if they stated they represented *living* next of kin exclusively.

But whatever the pass-word was, it has been given. The Court of Claims has lifted the gate and we are through. Now the law must have its course, our law, the Massachusetts law, the law which these administrators have given bonds to follow, and which bonds they were obliged to certify to the Court of Claims in order to get this very money.

But if "next of kin" means kin strictly, and that such kin alone are to take, then it means kin living at the decease of the original sufferer.

The period of decease is always, in the absence of clear intent to the contrary, the period at which heirs or next of kin are determined.

Jarman on Wills, 5th Amer. Ed. Vol. 2, p. 670.

The mind of the draftsman was turned to the past, to the original sufferer; did it at once turn to the present on the mention of next of kin?

It will be said that a gratuity cannot be given to a dead person. In the first place it is not a case of gratuity; and in the second place, even if it were a gratuity, the beneficial donees who, it is admitted, must, in such case be living, may be as well designated "those now entitled had it formed part of the sufferer's estate" (which is equivalent to next of kin at death of the sufferer) as "those now entitled had the sufferer died in the state of his domicile possessed of the prop-

erty, intestate, and without surviving husband or wife." There is no word in the whole proviso which implies that *now living next of kin* were meant.

Granting, then, that if Crowell Hatch had willed away his property from his kin, the kin and not legatees would have taken, yet here he willed to his kin, his four children, of whom Henry was one, and whose administrator must take a share in either aspect.

Suppose it is a gratuity, — why infringe farther than is necessary upon the rights of the original sufferers to have the funds treated as part of their estates?

EVEN IF THE COURT SHOULD BELIEVE THAT IN SOME VAGUE AND GENERAL WAY THE NEXT OF KIN LIVING AT THE DATE OF THE ACT WERE INTENDED TO TAKE, THE INTENT IS NOT SO EXPRESSED THAT IT CAN SO TAKE EFFECT.

The meaning of this statute cannot be guessed at.

Suppose it were a will where, if ever, *intent* is the polar star of construction. First comes a clear grant to pay a debt which has passed into judgment, then comes this ambiguous proviso. It could not operate to cut down a clear grant.

There is certainly nothing within the four corners of this instrument which shows such intent in any clear form; quite a contrary intent is shown. Beyond and outside the instrument, the surroundings and motives of the actors are more than ever convincing that no such intent existed. If there were an intent to pay

to an administrator under bonds in our courts a fund which he was not to treat as assets, and which yet was to be secured by his bond, this was an inconsistent and impossible intent.

It is not denied that an executor in Massachusetts may, under the operation of the statute law, collect, in certain cases, rents for which he will be held liable on his bond, though not strictly assets, nor that he may not collect life insurance moneys belonging to the widow *where the contract was with the deceased*, nor that he may not be empowered by statute to collect compensation for death for the benefit of next of kin. But it cannot plausibly be claimed that these administrators would be liable on their bonds, or that the Probate Court would have jurisdiction in respect to these amounts unless they were assets. Special legislation would have been requisite in Massachusetts (and probably in every other State where any original sufferer was domiciled), to carry out the intent of gratuity to living next of kin collected by executors and administrators of the original sufferers. Surely, plain terms would have been employed if such an unusual purpose had been entertained.

Authority.

The state of the authorities, so far as decisions in the State Courts have been made, is this: —

The highest courts of Massachusetts, Connecticut

and Pennsylvania have decided in support of the position here contended for, —

Balch v. *Blagge*, 157 Mass. 144.
Codman v. *Brooks*, 159 Mass. 457.
Estate of Clement, 155 Penn. State R. 85.
Leffingwell's appeal, 62 Conn. 347.

The dissenting opinion in the case of *Codman* v. *Brooks*, supra, leaves the Court still unanimous on the point (alone material to to this case) that next of kin means next of kin at the date of the death of the original sufferer.

The Supreme Court of the District of Columbia (as we have seen) and the Maryland Court have decided *contra*.

The Pennsylvania Court has reversed its first decision, and now stands opposed.

Estate of Clement, 160 Penn. State R. 391.

In no one of the cases *contra* has there been any attempt to analyze the statute or to say what its language means. The opinion in these cases go upon the idea of gratuity, and on theories of intent which cannot be supported.

Cox, J., says, in *Gardiner* v. *Clarke*, that Congress did not concur in the findings of the Court of Claims, but that "in appropriating for the payment of awards, Congress has expressly provided that in cases of bankruptcy the award shall be made to the next of kin

instead of the bankrupt assignee, thus ignoring the incident of ownership."

It is submitted, however, that Congress has *not* made the award to the *living* next of kin, and that in cutting off the bankrupt's assignee, it has not ignored but recognized the incident of ownership and has not restricted the ownership as property, except to bar the claims of creditors in bankruptcy.

If the claim was not property, what had the assignee to do with it! It was because the claim was property, in the nature of assets, that Congress saw the necessity of cutting off the assignees.

Had Congress intended it, how easy to have said "All the foregoing awards shall be distributed among living next of kin of the original claimant."

In conclusion, it is submitted that there is one perfectly reasonable, probable interpretation of the intent and the language of Congress. The plaintiffs in error desire a construction not only contrary to the spirit and true intent of the Act, but which its words cannot be tortured into speaking.

FRANCIS V. BALCH,
FELIX RACKEMANN,
Counsel for Defendant in Error.

[redacted]

October Term, [redacted]

Augustus R. S. Foote, *et al.*

vs.

The Women's Board of Missions, *et al.*

[redacted]

BRIEF OF WILLIAM [redacted]

For Plaintiffs in Error.